DALLAS COUNTY
JOHN VANCE
DISTRICT ATTORNEY
CIVIL SECTION

RQ-934

March 28, 1997

FILE # ML-39506-97
I.D.# 39506

Honorable Dan Morales
Attorney General of Texas
P. O. Box 1247
Capital Station
Austin, TX 78711

RE: Request for Opinion Whether Posting of an Appeal Bond Will Excuse an Appealing Party from Paying Costs Under Texas Rules of Civil Procedure 143a.

Dear General Morales:

The Dallas County District Attorney's office, on behalf of Earl Bullock, Dallas County Clerk, respectfully requests your opinion on the following questions:

(1) Whether a party posting an adequate appeal bond under Rule 587 is excused from paying the costs as required by Rule 143a?

(2) Whether Rule 143a is applicable in cases in which a person has filed an affidavit of inability to pay costs pursuant to Rule 572?

BACKGROUND

When a case is appealed from justice court, the Dallas County Clerk's office processes the case as a new suit. Upon receipt of the appeal papers from a justice court, the Clerk's office sends out a notice to the appealing party directing that the Clerk's fees of $155.00[1]. If the appealing party fails to pay the costs within a twenty (20) day period, the appeal is deemed not perfected and returned to the justice court in accordance with Rule 143a.

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[1] These fees consist of judicial salary fee, $30.00; security fee, $5.00; record management fee, $5.00; clerk's fee, $40.00; court reporter service fee, $15.00; bailiff fee, $30.00; law library fund fee, $15.00; appellate fee, $5.00; and mediation fund, $10.00.

Recently, the clerk has expressed concern about whether or not the appeal bond may be viewed as a supersedeas bond. In this circumstance it may be appropriate to consider the instance where a plaintiff who is awarded a take nothing judgment chooses to appeal separately from the circumstance where a party wishes to appeal from a monetary judgment. Likewise it may also be appropriate to consider the issue of an individual who appeals based upon an affidavit of inability to pay costs on appeal filed under Rule 572 separately from a person posting an appeal bond pursuant to Rule 571.

DISCUSSION

As expressed by Rule 573, an appeal is perfected when the party desiring to appeal provides a bond or affidavit of inability to pay cost. It appears that this should only perfect the taking of the appeal and not the filing of the appeal. Jurisdictionally, the party appealing must satisfy the costs in order to fully perfect their appeal. Rule 143a

The difficulty arises because of language contained in *Almahrabi v. Booe*, 868 S.W.2d 8 (Tex. App. – El Paso, 1993, no writ). In addressing the issue of whether the appeal bond was analogous to a supersedeas bond and sufficient to satisfy both Rule 571 and 143a, the Court relied on *Young v. Kilroy Oil Company of Texas*, 673 S.W.2d 236 (Tex. App. – Houston, 1st Dist. 1984, writ refused n.r.e.). *Young* held that a supersedeas bond may serve as a cost bond. In *Almahrabi*, the Court of Appeals parenthetically noted that *Young v. Kilroy* was decided under rules governing appeals from county and district courts to the court of appeal and did not involve an appeal from justice to county court.

Rule 571 contains general provisions governing an appeal bond being posted in the event a losing party desires to take an appeal from the judgment of the justice court. The rule contains a standard by which the amount of bond is to be set by the justice court. The Rule also provides that the bond is payable to the appellee. The Rule provides that the bond shall "be payable to the appellee conditioned that the appellant shall prosecute his appeal with effect ... ." When a losing plaintiff is the appellant, the Rule further provides that the bond shall be further conditioned that "the plaintiff shall pay off and satisfy such costs if judgment for costs be rendered against him on appeal." Nothing in Rule 571 appears to provide any protection for the County Clerk.

Rule 143a is intended to protect the county clerk in cases of appeal. In *Almahrabi*, the Court of Appeals held that compliance with both Rule 571 and 143a were jurisdictional. 868 S.W.2d 10. *Almahrabi* continues, expressing the idea that an appeal bond may be considered to be a supersedeas bond and as such may be sufficient to cover the costs including the clerk's filing fees. This inference is based on dicta in *Almahrabi* that the bond was analogous to a supersedeas bond.

At this point it seems appropriate to apply *Almahrabi* to the case of a person appealing an adverse money judgment against them. In this situation Rule 571 specifies that the bond is "double the amount of the judgment." Using $155.00 as a benchmark, if the judgment is less than that amount, then there is no possibility that the appeal bond would exonerate the appellant from complying with the requirements of Rule 143a. This is because the additional amount would in no way be sufficient to cover the costs on appeal.

If the judgment were more than $155.00, it would appear that under Rule 571 the bond would not be sufficient to cover Rule 143a since the bond does not have to make any provision for court costs.

This leaves the case where the plaintiff has received a take nothing judgment and desires to appeal. In this instance the amount of the bond is required to

> in double the amount of costs incurred in the justice court and estimated costs in the county court, less such sums as may have been paid ...

Here the bond requirements make specific reference to the costs in county court, and it would appear that under *Almahrabi*, the appellant could be exonerated from Rule 143a's requirements. Nevertheless, we believe that the more plausible interpretation is to read Rules 571 and 143a together as two distinct requirements to perfect an appeal. This was the initial holding of *Almahrabi*.

Finally, the interaction of Rules 143a and 572 needs to be considered.

Rule 572 permits a party who "is unable to pay the costs of appeal, or give security therefore" "to perfect an appeal by filing, subject to challenge, an affidavit of their inability to pay such costs. If the affidavit is uncontroverted or a contest is overruled, the appeal is perfected under Rule 573. Rule 143a then comes into play, ostensibly requiring the appellant from justice court to pay the appropriate filing fees in the county court. Here two possibilities exist. First, the affidavit operates to exonerate the appellant from paying those costs. This would be consistent with the plain reading of Rule 572.

The other approach is predicated upon the appeal being a trial *de novo*. Under this view, the appellant would have to give a new affidavit of inability to pay costs in the county court. The result could conceivably be the filing of a second affidavit, this one being in compliance with the requirements of Rule 145. This result seems to be antithetical to Rule 572.

CONCLUSION

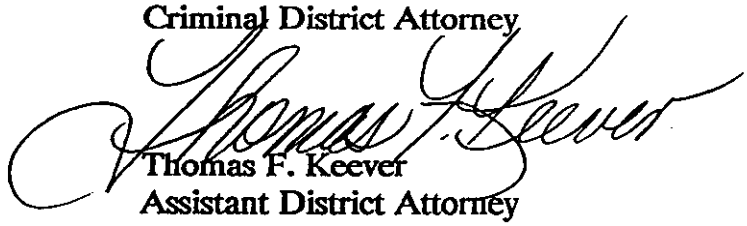
In conclusion, we submit that the interplay between Rules 143a, 571, and 572 are matters of state-wide concern, on which your opinion is requested in order that county clerks act consistently on a state-wide basis. We submit that even if a properly executed appeal bond is filed under Rule 571, the appellant is not excused from paying whatever costs may be due to the county clerk under Rule 143a. While this position may be contrary to dicta in *Almahrabi*, the appeal bond's purpose is not to guarantee payment to the clerk, but to insure that the appellee is protected from an appellant who takes an appeal for purposes of delay. That the bond is more in the nature of a supersedeas bond merely recognizes the fact that an appeal from a justice court case is a trial *de novo*.

Concerning the individual who files an affidavit of inability to pay the costs on appeal, we believe that it is appropriate for this affidavit, if unchallenged or if the appellant meets their burden of proof upon challenge to be conclusive of the appellant's condition in both as to taking the appeal and paying the costs due under Rule 143a. The other prospect, requiring two affidavits, one under Rule 572, and one under Rule 145 would work a

hardship on the appellant at a minimum and could likely result in inconsistent decisions at each level. Such a result seems inconsistent with the ability to have a meaningful appeal.

Sincerely,

John Vance
Criminal District Attorney



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HJV:agr